clerks 6/7

No. 646

No. 15411

Office - Supreme Court, U.S.
FILED
DEC 6 1957
JOHN T. FEY, Clerk

United States
Court of Appeals
for the Ninth Circuit

JOHN J. MOYLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

FILED
FEB 15 1957

No. 15411

United States
Court of Appeals
for the Ninth Circuit

JOHN J. MOYLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California.
Central Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer 7

Attorneys, Names and Addresses of 1

Certificate by Clerk 53

Complaint 3

Findings of Fact, Conclusions of Law and Judgment 11

Notice of Appeal 15

Notice of Entry of Judgment 15

Statement of Points 16

Transcript of Proceedings 17

Witness:

Moylan, John J.

—direct 20
—cross 33
—redirect 37, 46
—recross 48
—by the court 45

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

THOMAS J. GATELY, ESQ.,
112 West Seventh Street,
San Pedro, California.

For Appellee:

LAUGHLIN E. WATERS,
U. S. Attorney;

MAX F. DEUTZ,
Asst. U. S. Attorney,
Chief, Civil Division;

RICHARD A. LAVINE,
Asst. U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

United States District Court for the
Southern District of California

Civil Action No. 19810-HW

JOHN J. MOYLAN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR BREACH OF CONTRACT

Plaintiff, complaining of the defendant, alleges:

First Count

I.

This action is brought under Section 1346 (a) (2) of Title 28 of the United States Code and is founded on an express contract with the United States.

II.

The amount in controversy does not exceed $10,000.00 in amount.

III.

Plaintiff now is and for many years last past, has been a resident and citizen of the city of Los Angeles, County of Los Angeles, state of California, within the territorial jurisdiction of this court.

IV.

At all times herein mentioned plaintiff was, and now is, a duly licensed freight forwarder and en-

gaged in business in the city of Los Angeles, county of Los Angeles, state of California. [2*]

V.

At all times herein mentioned the Pacific Westbound Conference, an association of ocean carriers operating from West Coast Ports, paid a brokerage fee to freight forwarders designated by shippers as their agents.

VI.

On or about the 9th day of July, 1951, plaintiff entered into a written contract with defendant whereby, in consideration of the aforesaid brokerage fee, plaintiff agreed to act as agent of the defendant in performing any and all forwarding services on shipments of the defendant which defendant might request plaintiff to do and perform.

VII.

Pursuant to the terms of said contract and between the 9th day of July, 1951, and the 18th day of August, 1953, plaintiff performed all conditions of said contract on his part to be performed in that he acted as agent of the defendant and performed forwarding services on all shipments of the defendant which defendant requested plaintiff to do and perform.

VIII.

On or about the 31st day of July, 1951, and many times thereafter, plaintiff demanded of defendant that defendant file with said Conference a designa-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

tion of plaintiff as its agent, but defendant then, and has ever since, refused and neglected to file said de ignation with said Conference.

IX.

By reason of said refusal and neglect on the part of the defendant, plaintiff has lost the sum of Eight Thousand Three Hundred Five ($8,305.00) Dollars, in brokerage fees, no part of which has been paid.

Second Count

I.

Plaintiff repleads all of the allegations contained in paragraphs I, II, III, IV, and V of his first count, to which reference is hereby made, and the same are hereby incorporated and referred to in this count, and made a part hereof as though the same were again fully set forth. [3]

II.

Between the 9th day of July, 1951, and the 18th day of August, 1953, defendant requested plaintiff to act as its agent in performing forwarding services on shipments of the defendant and plaintiff, in consideration of the brokerage fee paid by the aforesaid Conference, at the special instance and request of the defendant acted as agent of the defendant and did and performed forwarding services on the shipments of the defendant.

III.

On or about the 31st day of July, 1951, and many times thereafter, plaintiff demanded of defendant that defendant file with said Conference a designation of plaintiff as its agent, but defendant then, and

has ever since, refused and neglected to file said designation with said Conference.

IV.

By reason of the said refusal and neglect on the part of the defendant, plaintiff has lost the sum of Eight Thousand Three Hundred Five ($8,305.00) Dollars, in brokerage fees, no part of which has been paid.

Third Count

I.

Plaintiff repleads all of the allegations contained in paragraphs I, II, III, and IV, of his first count, to which reference is hereby made, and the same are hereby incorporated and referred to in this count, and made a part hereof as though the same were again fully set forth.

II.

Between the 9th day of July, 1951, and the 18th day of August, 1953, plaintiff at the specific instance and request of the defendant, by and through its officers and agents, General Services Administration, performed services for the defendant as a forwarding agent for shipments of the defendant.

III.

The reasonable value of said services was the sum of Eight Thousand Three Hundred Five ($8,305.00) Dollars.

IV.

No part of said sum of $8,305.00 has been [4] paid.

Wherefore, plaintiff demands judgment against the defendant for the sum of Eight Thousand Three Hundred Five ($8,305.00) Dollars, with interest and costs.

Dated: April 16, 1956.

/s/ THOMAS J. GATELY,
Attorney for Plaintiff.

Duly Verified.

[Endorsed]: Filed April 17, 1956. [5]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now the defendant, United States of America, and by way of Answer to the Complaint in the above-entitled action, denies, admits, and alleges as follows:

First Cause of Action

I.

Admits the allegations contained in Paragraphs I, II, III and IV of the First Cause of action.

II.

With reference to Paragraph V, defendant does not have sufficient knowledge to answer same, and based upon said lack of knowledge denies same.

III.

Denies each and every allegation contained in Paragraph VI.

IV.

With reference to Paragraph VII, defendant does not have [7] sufficient knowledge to answer same, and based upon said lack of knowledge, denies same.

V.

With reference to Paragraph VIII, admits that defendant did not file with the Pacific Westbound Conference the designation of plaintiff as defendant's agent. Defendant does not have sufficient knowledge to answer the other allegations of this paragraph, and based upon said lack of knowledge denies same.

VI.

Denies each and every allegation contained in Paragraph IX.

VII.

Defendant has made an administrative settlement with plaintiff as to certain services performed by plaintiff for defendant, and as a result of said administrative proceeding, plaintiff was paid the sum of $1,881.10 by defendant. If defendant is found liable that such liability should be reduced by the sum of $1,881.10 heretofore paid.

Second Cause of Action

I.

With reference to Paragraphs I, II, III and IV of plaintiff's First Cause of Action, repleaded in Paragraph I of the Second Case of Action, defendant repleads Paragraph I of its Answer to the First Cause of Action.

II.

With reference to Paragraph V of the First Cause of Action, repleaded in Paragraph I of the Second Cause of Action, defendant repleads Paragraph II of its Answer to the First Cause of Action.

III.

With reference to Paragraph II, denies each and every allegation. [8]

IV.

With reference to Paragraph III, admits that defendant did not file with the Pacific Westbound Conference the designation of plaintiff as defendant's agent. Defendant does not have sufficient knowledge to answer the other allegations of this paragraph, and based upon said lack of knowledge denies same.

V.

Denies each and every allegation of Paragraph IV.

VI.

Repleads the allegations of Paragraph VII of its Answer to the First Cause of Action as though at length set forth herein.

Third Cause of Action

I.

With reference to Paragraphs I, II, III and IV of the First Cause of Action repleaded as Paragrap I of the Third Cause of Action, defendant repleads Paragraph I of its Answer to the First Cause of Action.

II.

With reference to Paragraph II, admits that plaintiff performed certain services in connection with shipments of defendant between the dates mentioned. Except as specifically admitted, denies each and every allegation contained therein.

III.

With reference to Paragraph III, denies each and every allegation contained therein. In this regard, defendant alleges that the reasonable value of plaintiff's services was $1,881.10.

IV.

With reference to Paragraph IV, denies each and every allegation contained therein.

V.

Repleads the allegations of Paragraph VII of its Answer [9] to the First Cause of Action, as though at length set forth herein.

Wherefore, defendant prays that plaintiff shall take nothing by this action, that judgment shall be

granted to the defendant, and for such other or further relief as may be proper.

Dated: This 9th day of July, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant United States Attorney, Chief of Civil Division;

/s/ RICHARD A. LAVINE,
Assistant U. S. Attorney, Attorneys for Defendant, United States of America.

[Endorsed]: Filed July 9, 1956. [10]

United States District Court, Southern District of California, Central Division

No. 19810-HW

JOHN J. MOYLAN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

The above-entitled case, being duly set and noticed for trial, went to trial on Monday, October 8, 1956,

before the Honorable Harry C. Westover, Judge presiding; Thomas J. Gately appearing as attorney for plaintiff, John J. Moylan; and Laughlin E. Waters, United States Attorney, Max F. Deutz and Richard A. Lavine, Assistants United States Attorney, appearing for defendant, United States of America; and evidence having been taken and documents introduced, the court hereby makes the following:

Findings of Fact

1. Plaintiff was and now is a duly licensed freight forwarder and engaged in such business in the City of Los Angeles, County of Los Angeles, State of California, and was and is a resident and citizen of same.

2. At all times involved in this action the Pacific Westbound Conference, an association of ocean carriers operating from West Coast Ports, paid a brokerage fee to [11] freight forwarders designated by shippers as their agents.

3. Plaintiff and defendant did not enter into any contract, either oral or written, either before, on, or after July 9, 1951, concerning the subject matter of this action.

4. Plaintiff performed certain forwarding services on shipments of defendant with the knowledge, approval and consent of defendant, which services were for the benefit of defendant.

5. Defendant did not agree to pay any specific brokerage fee to plaintiff for said forwarding services.

6. On or about the 31st day of July, 1951, and on occasions thereafter, plaintiff demanded of defendant that defendant file with said Conference a designation of plaintiff as its agent, but defendant then and has ever since refused to file said designation with said Conference, with relation to the shipments and brokerage services which are the subject matter of this action.

7. The reasonable value of the services which plaintiff performed for the benefit of defendant is the sum of $1,881.10.

8. The General Accounting Office heretofore had stated that the sum of $1,881.10 was the reasonable value of the services, in the opinion of that office, and had issued its Certificate of Settlement. A check in the sum of $1,881.10, dated August 24, 1955, was issued by the General Accounting Office and delivered to plaintiff. Plaintiff still has such check in his possession. In view of the determination of this court as to the reasonable value of the services, delivery of such check is now determined to constitute payment of the reasonable value of services rendered by plaintiff to defendant which are the subject matter of this action.

9. No sum is presently due by defendant to plaintiff for services performed by plaintiff for defendant, which are the subject matter of this action. [12]

Wherefore, based on said Findings of Fact, the court renders the following:

Conclusions of Law

1. This court has jurisdiction of this action by virtue of Section 1346(a)(2) of Title 28, United States Code.

2. Plaintiff and defendant did not enter into any contract, either oral or written, either before, on or after July 9, 1951, concerning the subject matter of this action.

3. Plaintiff has been paid in full for the reasonable value of services rendered for the benefit of defendant, which are the subject matter of this action.

4. Plaintiff shall take nothing by this action.

Wherefore, based on said Findings of Fact and Conclusions of Law, the court hereby renders the following:

Judgment

1. Plaintiff shall take nothing by this action.

2. Judgment shall be and hereby is in favor of defendant.

3. Defendant shall have and is hereby awarded judgment against plaintiff for costs of suit in the amount of $20.00. Taxed 10/31/56, no objections.

Dated: October 23rd, 1956.

/s/ HARRY C. WESTOVER,
United States District Judge.

Presented by:

/s/ RICHARD A. LAVINE,
Asst. U. S. Attorney.

Affidavit of Service by Mail attached.

Lodged October 17, 1956.

[Endorsed]: Filed October 23, 1956. [13]

[Title of District Court and Cause.]

ENTRY OF JUDGMENT

You are hereby notified that judgment has been docketed and entered this day in ....., the above-entitled case.

Dated: October 24, 1956, Los Angeles, Calif.

CLERK,
U. S. District Court;

By C. A. SIMMONS,
Deputy Clerk. [15]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John J. Moylan, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 24th day of October, 1956.

Dated: November 20, 1956.

/s/ THOMAS J. GATELY,
Attorney for Plaintiff-Appellant.

Affidavit of Serivce by Mail attached.

[Endorsed]: Filed December 7, 1956. [16]

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS OF APPEAL

The points upon which plaintiff appellant will reply on appeal are:

1. The court erred in holding and deciding that plaintiff and defendant did not enter into any contract concerning the subject matter of this action.

2. The court erred in holding and deciding that plaintiff performed certain forwarding services on shipments of the defendant with the knowledge, approval and consent of the defendant.

3. The court erred in holding and deciding that the reasonable value of the services which plaintiff performed for the benefit of defendant is the sum of $1,881.10.

4. The court erred in holding and deciding that no sum is presently due by defendant to plaintiff for services performed by plaintiff for defendant.

5. The court erred in holding and deciding that plaintiff shall take nothing by this action.

Dated: December 10, 1956.

Respectfully submitted,

/s/ THOMAS J. GATELY,
Attorney for Plaintiff-Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 11, 1956. [20]

In the United States District Court, Southern District of California, Central Division

No. 19810

JOHN J. MOYLAN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Honorable Harry C. Westover, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Monday, October 8, 1956

Appearances:

For the Plaintiff:
THOMAS J. GATELY, ESQ.

For the Defendant:
LAUGHLIN E. WATERS,
United States Attorney; by
RICHARD LAVINE,
Assistant United States Attorney.

Monday, October 8, 1956—2:00 P.M.

The Clerk: No. 19810-HW Civil, John J. Moylan vs. United States, trial.

Mr. Gately: Pursuant to stipulation with the attorney for the defendant, we would like to offer all our exhibits in evidence at this time.

The Court: All right.

Mr. Gately: Would you like them explained as I offer them?

The Court: No. Give them to the clerk and have the clerk mark them. Give them to the clerk in the order in which you want them marked.

Mr. Gately: Yes, your Honor.

Mr. Lavine: Your Honor, with the permission of counsel for plaintiff and in the interest of clarity, I would like to introduce at this time subsequent to the plaintiff's exhibits the exhibits of the defendant so that your Honor may see the whole mass of material at once.

The Court: Let's get one set marked at a time.

The Clerk: Plaintiff's Exhibits 1 to 24, inclusive.

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits 1 to 24.)

The Court: Now, if the government wants to present its documents—— [3*]

Mr. Lavine: Your Honor, we offer Defendant's Exhibits A through I, inclusive, into evidence.

The Court: They may be received.

The Clerk: Exhibits A through I in evidence.

(The exhibits referred to were received in evidence and marked as Defendant's Exhibits A through I.)

The Court: All right. Counsel, do you want to explain what these are?

Mr. Gately: Your Honor, this is a case involving——

The Court: I have read the pleadings and I have read your statement.

Mr. Gately: In brief, there is a series of letters between the plaintiff and General Services Administration pertaining to the requested services, a request for power of attorney, for certification of the invoice, the refusal of the GSA to so certify, the decisions of the Comptroller's Office denying the plaintiff full compensation.

The Court: Do you have any evidence other than the documents? Is there any oral testimony?

Mr. Gately: Yes. I want to put the plaintiff on the stand.

The Court: Let's have the plaintiff on the stand then. Let's get his story. [4]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

JOHN J. MOYLAN

the plaintiff, called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: You may be seated. Will you state your name?

The Witness: My name is John J. Moylan, M-o-y-l-a-n.

Direct Examination

By Mr. Gately:

Q. Mr. Moylan, are you the plaintiff in this action? A. Yes, I am.

Q. Where is your office located?

A. 354 South Spring Street, Los Angeles.

Q. How long have you been in business there?

A. Since 1948.

Q. Are you registered with the Federal Maritime Board?

A. Yes. With them our registration number is 676.

Q. Could you give a brief description of your duties?

A. A freight forwarder handles export shipments for clients that are not in a position to handle export shipments. We either book or confirm the booking of the cargo on certain vessels, take care of the necessary Customs procedure, Customs, export declarations, we clear those, make the ocean bills of lading, consular invoices, prepare all the necessary [5] documents which relate to the export shipment.

(Testimony of John J. Moylan.)

Q. Who pays you for your services?

A. On commercial shipments, other than the government accounts, we get a service fee from our shipper, plus the 1¼ per cent of the ocean freight from the steamship company. On government shipments, we have to rely——

The Court: Wait a minute. Before we get to the government, what is the rate you get from the shipper?

The Witness: We get a forwarding fee, and that depends upon the work that is involved, your Honor. There is no certain percentage.

The Court: There is no certain percentage?

The Witness: No, sir, there is not.

The Court: How do you determine the fee?

The Witness: Well, from one we get $10 and another one, two or three hundred dollars.

The Court: Who determines the fee?

The Witness: We determine the fee.

The Court: In other words, when you do the shipping, after you get the work all done, you bill them?

The Witness: We figure out how much time and work was involved in the shipment.

The Court: And then you get how much?

The Witness: From the steamship company we get our brokerage, which is figured at 1¼ per cent of the ocean [6] freight.

The Court: And from the government what do you get?

The Witness: The government, we only can col-

(Testimony of John J. Moylan.)

lect the ocean freight brokerage and that is considered as our fee for handling the shipment. That applies not only to GSA but to the other government agencies that are handling export shipments.

The Court: This is paid by the steamship company, isn't it?

The Witness: Yes, by the carrier.

The Court: So the government doesn't pay you anything?

The Witness: No.

The Court: So your entire compensation comes from the steamship company?

The Witness: Yes.

Q. (By Mr. Gately): Are the carriers you deal with members of the Pacific Westbound Conference? A. Yes.

Q. Prior to June, 1951, did these carriers pay brokerage to the forwarders?

A. No, they did not.

Q. In 1950 did you have any dealings with General Services Administration?

A. In 1950, I received an invitation to bid on handling [7] of their export shipments for a period of one year, and I submitted a bid of 6½ cents per revenue ton or a minimum of $7.50 per shipment.

Q. Were you awarded this contract?

A. Yes, I was.

Q. You said it ran for one year? A. Yes.

Q. What is your main reason for billing 6½ cents a ton?

(Testimony of John J. Moylan.)

Mr. Lavine: I object. I fail to see the materiality of why he went into the previous contract.

The Court: Overruled. You may answer.

The Witness: I had several reasons. I wanted to get on the list of government approved forwarders which handle the government shipments, and if you did not submit a bid your name was dropped from the invitation list.

Also, at that time, your Honor, before the Federal Maritime Board we had a case pending to have the Federal Maritime Board, to get them to delete the prohibition of freight brokerage in the Pacific Westbond Conference, and I felt with all of that I wanted to become the successful bidder and be able to show the government my method of handling and the quality of the work and I was willing therefore to sacrifice profit on that contract.

Q. (By Mr. Gately): In 1951, did the Conference change [8] its rules as to brokerage fee?

A. Yes. In 1951 the Federal Maritime Board instructed the Conference to delete the prohibition of brokerage to designated forwarders.

The Court: What do you mean by that?

The Witness: Your Honor, before you can collect brokerage, you just don't submit a bill to the steamship company, but you have to be designated by the shipper to collect the brokerage.

The Court: In 1951 the government allowed you to collect your brokerage from the steamship company, is that right?

The Witness: No, they did not.

(Testimony of John J. Moylan.)

The Court: Prior to 1951, they did not, but you said in 1951 they changed the rule.

The Witness: Are you talking about GSA or the United States Government, sir?

The Court: All right. You said the Federal Maritime Board.

The Witness: Th Federal Maritime Board instructed the steamsh p conference to delete the prohibition of brokerage in their rules, but GSA did not allow us to collect it. Is that what you mean?

The Court: No. I am just trying to find out what the facts are. [9]

The Witness: Sir, two governments are there. That is what confuses me. There is the United States Government and the Federal Maritime Board. The Federal Maritime Board allowed us to collect it, but GSA did not permit us to collect it.

The Court: All right.

Q. (By Mr. Gately): When your contract expired in 1951, what did you do?

A. I wrote to GSA's Washington office and offered to perform the forwarding service for their export shipments at no charge to them in view of the fact that the brokerage was now payable by the steamship company, that the shipper designated the brokerage to be paid.

Q. When you made this offer, did you know the Conference rule regarding the payment of brokerage? A. Yes, I did.

Q. What was that rule?

A. In order to collect brokerage from the steam-

(Testimony of John J. Moylan.)

ship company, you had to have on file with them, Pacific Westbound Conference, a brokerage power of attorney, or if that wasn't acceptable to the shipper, the shipper could take the invoice, the brokerage invoice, to the steamship company and certify that the brokerage was payable.

Q. In the event GSA accepted your offer to perform these services, what did you expect GSA to do? [10]

A. I expected GSA to give me the necessary power of attorney, brokerage power of attorney, in order to collect my brokerage.

Q. This original letter you wrote, did you receive a reply from GSA?

A. Is this the one in July?

Q. July 3, 1951.

A. Yes, I received a letter from GSA and they said in view of the payment of brokerage, they would rotate the shipments among the authorized forwarders and that we would have to look to the steamship companies for the brokerage.

Q. How long after this letter from GSA did they send you the first shipment?

A. Almost immediately.

Q. How long did they use your forwarding services?

A. From July, 1951, until August, 1953, or—yes, I think 1953.

The Court: Just a minute. From July, 1951, to August, 1953, you handled this without any charge to the government?

(Testimony of John J. Moylan.)

The Witness: Yes, sir. I did not receive any compensation.

The Court: And you didn't receive any compensation from the steamship lines?

The Witness: No. [11]

Q. (By Mr. Gately): To your knowledge, do you know whether GSA sent any shipments to any other forwarders in Los Angeles?

A. No. I believe I handled all their shipments during that period.

Q. Did you perform all these requested services expecting compensation? A. Yes, I did.

Q. What compensation did you expect?

A. I expected to receive 1¼ per cent of the ocean freight.

Q. For each shipment did GSA send you instructions how to handle it?

A. Yes. Each shipment was a separate set of instructions.

Q. Did they mention anything about the capacity in which you were acting?

A. Yes. We were their designated forwarding agent.

Q. Did you fully perform all the requested services during this period? A. Yes, I did.

Q. Did you believe at any time you were working under the rates of the expired contract?

A. Never.

Q. What procedure had to be followed to entitle you to [12] brokerage payments?

A. In order to collect brokerage from the various lines, the government, GSA, would have to sign

(Testimony of John J. Moylan.)

the necessary brokerage power of attorney and we would file it with the Pacific Westbound Conference or, in lieu of that, they would have to certify our brokerage invoice to the steamship company .

Q. During the period 1951 to 1953, did GSA ever file a power of attorney to certify your invoices? A. No, they did not.

Q. Did you ever request GSA to file this power of attorney and certification?

A. Yes, I requested them many times, sir. We had phone conversations, letters, and I also had a friend of mine stop in to see Mr. Salisbury in Washington.

Mr. Gately: Your Honor, I was going to go through the original requests and refusals, but they are all in evidence.

The Court: That won't be necessary. I want to go over these exhibits after I have heard the testimony, the oral testimony.

Q. (By Mr. Gately): Did GSA postpone action on your requests and refuse your requests many times?

A. Each request I put in, we never got an affirmative answer to. They always postponed it.

Q. Why did you continue to perform the services? [13]

A. Well, from the very beginning they assured me we would get paid, and it was just a matter of straightening out the situation.

The Court: Have you been paid anything?

(Testimony of John J. Moylan.)

The Witness: No, not a thing.

The Court: They didn't pay you anything?

The Witness: Oh, I received a check for settlement, but I have not cashed it, sir.

The Court: What did you do with the check?

The Witness: I have that in the bank for safekeeping.

The Court: When did you get the check?

The Witness: I would have to look at my correspondence, your Honor, to find out. It has been quite some time now. I think it was some time last year, or it might have been the first of this year. I am not quite sure.

The Court: This case was filed April, 1956. How long before you filed this case did you get a check?

The Witness: It would be last year some time then, your Honor.

The Court: You didn't send the check back?

The Witness: Oh, I did. I sent my check back to the Comptroller's Office and asked them for reconsideration for full compensation and they returned it to me. The reason I haven't cashed that check is I didn't want to forfeit any [14] future legal rights to pursue this.

The Court: What method did the GSA use?

The Witness: The old contract form, the old contract basis.

The Court: 6½ cents per ton?

The Witness: Yes, sir, or $7.50 minimum, sir.

Q. (By Mr. Gately): Could you tell me how much work is involved in the actual booking of a cargo?

(Testimony of John J. Moylan.)

A. Actually, a phone call will do it. We have solicitors from the various steamship companies making daily calls at our office, so it is not a great effort.

Q. Did GSA ever let you become a cargo booker, or credit you with booking the cargo during this period? A. No, they did not.

Q. Did you ever suggest to GSA how this could be done?

A. Yes, I did. I suggested that they could tentatively reserve the space in Washington, and when we got the shipping instructions, we could make a firm booking here.

Q. What did they do about your suggestion?

A. They didn't do anything about it.

Q. Did GSA ever change their procedure in regard to booking cargo?

A. Yes. In August, 1954, I believe it was, we received a brokerage power of attorney from them authorizing us to collect a brokerage and their new instructions were similar [15] to what I suggested, they make the reservations in Washington and we make the firm booking out here.

Q. Under this new procedure did GSA issue you a power of attorney? A. Yes, they did.

Q. For what period?

A. For September and October, I believe.

Q. What was the year? A. 1954.

Q. Did you collect the brokerage from the carriers with this power of attorney on file?

A. Yes.

The Court: You got this authorization when?

(Testimony of John J. Moylan.)

The Witness: In August, 1954, your Honor.

The Court: Then you didn't collect from July, 1951, to August, 1953, because GSA didn't give you the authority?

The Witness: Yes, sir.

The Court: But in 1954 it did give you the authority?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Gately): What is the prevailing charge for forwarding services in this area?

A. As I expained before, the commercial——

The Court: What difference does that make? All you [16] are asking for is the 1½ per cent.

The Witness: 1¼.

The Court: That's all you are asking for, isn't it?

Mr. Gately: I am trying to determine the reasonable value for the services.

The Court: All right. Go ahead. Excuse me.

The Witness: On commercial shipments, we get a service fee plus 1¼ per cent of the ocean freight. On government shipments, we get 1¼ per cent of the ocean freight.

The Court: May I inquire, according to your complaint, you asked for $8,305?

The Witness: Yes, sir.

The Court: Is that the amount that you would have been entitled to at 1¼ per cent?

The Witness: Yes, less postage, it came to that.

(Testimony of John J. Moylan.)

The Court: Do you contend $8,305 is a reasonable amount?

The Witness: Yes, sir. That is the amount agreed on.

The Court: You didn't agree. That's the trouble.

The Witness: Your Honor, the government places the forwarding services, the services are received from the forwarder at 1¼ per cent. When brokerage is payable, besides paying the forwarding fee—— [17]

The Court: After August, 1954, you collected the 1¼ per cent.

The Witness: Yes.

The Court: No problems?

The Witness: No, sir.

The Court: No question about 1¼ per cent being too much or too little?

The Witness: No. As a matter of fact, several times we have lost money on it, but it is in the agreement and I have stayed by my agreement prior.

Q. (By Mr. Gately): Did you submit separate invoices for postage expenses in handling the shipments?

A. Yes. We had a certain amount of postage on each shipment, but we would bill the government on each individual shipment.

Q. Did GSA approve these? A. Yes.

Q. By whom were you paid?

A. I submitted the postage invoice to GSA and we received a regular Government Accounting Office check, regular government check.

(Testimony of John J. Moylan.)

Q. If the government approved your claim for postage expenses pursuant to these services, why did they refuse to approve the claim for compensation?

A. They claimed we didn't do all the work. The only [18] thing that they claim we didn't do was book the cargo, which was just a phone call.

Q. The only thing that prevented you was their procedure which they changed later?

A. Yes, sir.

Q. How much do you claim the government owes you? A. $8,305.

Q. Have you been paid any part of your claim?

A. No. I have not, but I did receive a check for $1,881.10.

The Court: For how much?

The Witness: I think it is $1,881.10.

Mr. Gately: It is $1,881.10, your Honor.

Q. Have you been informed as to what was the total of freight charges charged to GSA for all the shipments you handled?

A. I believe that is somewhere around 630 or $650,000 ocean freight. That is just approximate now. All my invoices that I sent to Washington had those figures on.

Mr. Gately: I would like to show the plaintiff this letter from General Services Administration, your Honor please.

The Court: All right.

(Mr. Gately handing exhibit to witness.)

(Testimony of John J. Moylan.)

The Witness: Yes, sir. [19]

Q. (By Mr. Gately): How much does that state?

A. That says 678,000 and some odd change there.

Q. Just one more question, Mr. Moylan. During all the time that you performed these requested services, was there a common understanding as to how you were to be paid between GSA and you?

A. Yes, sir.

Q. What was that common understanding?

A. I was to receive the ocean freight brokerage, which was 1¼ per cent of the freight charges.

Q. You were to charge the government that?

A. Yes, sir.

Mr. Gately: That's all, your Honor.

Cross-Examination

By Mr. Lavine:

Q. Mr. Moylan, you mentioned the booking of cargo. Would you explain for us just what you mean by that?

A. Booking of cargo, if I may take an example, see, you have a shipment going to Venezuela. You are forwarding it.

We will check to find the first available steamer going there and we will call the steamship company and say we have so many tons for Venezuela and where and when do you want it delivered.

Q. Isn't it a fact that GSA always reserved the right to [20] book its own cargo?

A. At that time they did, sir.

(Testimony of John J. Moylan.)

Q. At the present time it still exercises the control, does it not, to book the cargo on whatever carrier it chooses?

A. Their procedure isn't any different now than it was before.

Q. Do I understand the answer to the question is they still reserve the right to choose the carrier which will carry their cargo?

A. Yes, sir. If their shipment can't make a certain ship, we have to go back to them and they will select another one.

Q. What is the ordinary commercial procedure on that? A. The same as I mentioned.

Q. In commercial procedure, isn't it quite often true that the commercial shipper allows you to pick the carrier? A. Oh, yes.

Q. The government does not allow you to pick the carrier? A. No, they do not.

Q. You mentioned the prevailing charges for commercial freight, forwarding fee, and you have also testified that varies from time to time, it is a matter of negotiation between yourself as a forwarder and the shipper? A. Yes. [21]

Q. What factors go into making up the decision as to what the final fee is going to be, Mr. Moylan?

A. It is the work involved. I mean on one shipment you might have hardly any work to do on it, and the other one you might have to go out and apply for an export license, arrange for the export packing, and there is a hundred and one little things.

(Testimony of John J. Moylan.)

Q. What are the variables in there? Withdraw the question.

In your experience, what would be the low, the minimum, the bottom forwarding fee?

A. In the forwarding fee, there is no minimum rate or maximum rate. We do not have any rate scale or tariff or published rates. It is just like a professional man, depending upon the case.

Q. So you are unable to estimate for us just what those variances might be, is that correct?

A. It would be very difficult, as I say, depending on how much work is involved. I wouldn't want to say that, sir.

Q. You mentioned that you submitted separate invoices for postage charges from time to time?

A. Yes.

Q. Do you recall what agency of GSA paid the charges?

A. I would say it was a General Accounting Office check, because we submitted our invoices addressed to GSA. [22]

Q. I show you Plaintiff's Exhibit 1, which appears to be the original contract back in 1950 that you negotiated with GSA. A. Yes, sir.

Q. With whom did you negotiate the contract, with what office or person in GSA did you negotiate the first contract?

A. Are you talking about the Washington office or the San Francisco office?

Q. First let's take the San Francisco office.

(Testimony of John J. Moylan.)

A. Well, we received this invitation from the San Francisco office, which we filled out and forworded to GSA, no particular attention, except in accordance with the bid here, but then I received a signed copy notifying us we had been awarded the contract by Mr.—here is his name here. That is the only gentleman.

Mr. Lavine: Mr. Moylan has indicated a letter from H. C. Maaske, Manager, General Services Administration, in San Francisco.

Q. I notice on this contract, Mr. Moylan, it bears the words on the first page of the contract itself—well, the acceptance is here for the government, the name J. M. Peed, I believe it is, whose title is Special Assistant to Director Purchase and Stores Division. Did you have any correspondence or conversation at that time with Mr. Peed?

A. No, sir. I don't know him at all. [23]

Q. He appears to be the contracting officer on that contract. Is that your understanding?

A. He has signed the contract.

Mr. Lavine: No further questions.

The Court: May I ask a question?

The Witness: Yes, your Honor.

The Court: During the period of July, 1951, to August, 1953, did the steamship company pay anybody—they were supposed to pay 1¼ per cent, but did they pay that to anybody? They didn't pay you.

The Witness: No, they didn't pay anybody that

(Testimony of John J. Moylan.)

I know of, because we were the only ones legally entitled to receive it.

The Court: In other words, the steamship company got to keep this 1¼ per cent.

The Witness: Yes. The ocean freight is the figure, or say if the freight was $10 a ton, if the shipper handled the shipment himself and he did not have a brokerage against that, he would still pay $10 a ton, regardless of whether 1¼ was paid out of it or not.

The Court: But the fact that the government didn't act meant that the steamship company kept this 1¼ per cent brokerage?

The Witness: Yes, sir, and they do that on commercial shipments. [24]

The Court: The government didn't get that?

The Witness: No.

The Court: And you didn't get it?

The Witness: No, sir.

The Court: All right.

Redirect Examination

By Mr. Gately:

Q. Mr. Moylan, in regard to your answer to his Honor, during this period didn't you file powers of attorney from various individual shippers and get paid brokerage? A. Oh, yes.

Q. They paid brokerage as long as the power of attorney was filed?

A. Yes, sir; as long as you met with the regulations of the Conference, they paid it.

(Testimony of John J. Moylan.)

Q. Mr. Lavine asked you about the variances in the rates on commercial shipments. What you charge on a commercial shipment, is that in addition to the 1¼ per cent you receive from the carrier?

A. Yes. On commercial shipments we get a forwarding fee, service charge for us, and we bill the carrier for 1¼ per cent of the ocean freight.

Q. Do you remember who was the man that wrote you the letter from GSA stating in view of the fact of the payment of [25] brokerage, we shall rotate shipments?

A. Yes. That was Mr. Salisbury.

Q. Who requested your services?

A. Mr. Salisbury.

Q. Mr. Salisbury. Do you know what position he holds?

A. He was the Director of the Transportation and Storage Division, I believe, of GSA.

Mr. Gately: That's all.

Mr. Lavine: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Gately: That's all, your Honor.

Mr. Lavine: The defendant rests, your Honor.

The Court: Well, I can't do anything until I have read your exhibits.

Mr. Lavine: Would your Honor care to hear any argument from counsel other than the briefs submitted?

The Court: It is rather useless to argue until I

have read the exhibits. They speak for themselves, don't they?

Mr. Lavine: There is one further point.

The Court: All right. Make it right now. Tell me what you think is so important so I can look at it.

Mr. Lavine: There is one point I haven't elaborated on in the memorandum. That is the complete lack of [26] authority of Mr. Salisbury, whose letter you will read, to bind the government. This is an unfortunate situation, your Honor. It is an example of the situation that can arise when somebody deals with government in hopes of receiving something yet without getting a signed contract.

It is also an example of why it is unwise of the government to deal with anybody without making a firm contract to deal with them.

The evidence will show, the defendant's exhibits set forth several affidavits of Mr. Salisbury pointing out he has no contracting authority whatsoever. He is not the man to make the contracts. Somebody else does.

Plaintiff's Exhibit 1, the previous contract, sets forth it is not Mr. Salisbury's division. It is the Purchase and Stores Division that makes these contracts.

As far as any conversation that Mr. Moylan, the plaintiff, had with Mr. Salisbury and what letters appear to be with that gentleman in Washington, if there is any authority at all and this were not a government case, it would be nothing more than

authority by estoppel. We are familiar with the old rule. The government is not bound by estoppel.

There are exceptions to that, as your Honor is well aware. Judge Mathes has given several decisions showing exceptions to the rule. However, there it is only in a case where a person on whose acts the plaintiff is trying to rely [27] has authority to do that which we are trying to hold him on. Sometimes the contracting officer leads somebody on too far to his detriment, and then you may in a certain situation find many legal authorities for estoppel against the government.

This is not such a case, because there is no showing he had the authority to bind GSA, and there is unequivocal authority in evidence that he did not have any such authority. Therefore, to start out with, he just did not have any power to make any kind of agreement at all.

I think my trial memorandum points out for your Honor, and your Honor will read the various letters, that there is no contract at all entered into between the parties here.

The Court: May I ask a question? There was a contract back in 1950 for 6½ cents a ton?

Mr. Lavine: Yes. That contract expired by its own terms.

The Court: If it expired on its own terms, how did the government arrive at 1881?

Mr. Lavine: The reasoning of the General Accounting Office was as follows. These services were not purely voluntary by Mr. Moylan. He was doing something of value to the government, and the Gen-

eral Accounting Office decided that this is a case where they would be entitled to recovery upon the reasonable value of his services. There was no [28] formal contract, no implied contract in effect, yet he had done something for the government and should be compensated.

The Court: The government says 1881 is reasonable?

Mr. Lavine: A reasonable amount on the basis of the old contract. Let's examine that a moment, your Honor. The plaintiff here was asking compensation, not from the government, but from a third person, the carrier.

The Court: All the government had to do was give the authority. It didn't cost the government a cent to give this authority. They sit back and don't do anything for three years. Why?

Mr. Lavine: At that time they had not adjusted their procedures so that they wanted to give him that authority or any other agent so situated.

The Court: Let's see. The testimony was that the federal board changed its rules in 1951 or before 1951. GSA did not allow the brokerage. After 1951, at least, somebody allowed it, somebody okayed it. Maybe GSA didn't, but some part of the government did.

Mr. Lavine: The difficulty at first, your Honor, was that the shipper demanded a power of attorney which at first the government, GSA, was not willing to give. Later on they changed their procedure in such a manner that they could give a power of at-

torney to people situated like the plaintiff. There was a change in procedure at a later time. [29]

At that time, as was shown by the correspondence between plaintiff and government officials, they did not give him such power of attorney because they did not designate him as the person who could book cargo without instructions.

The plaintiff has also testified, I believe, that it is not the custom of the government to allow forwarding agents to freely book. That is a privilege reserved by the government.

Later on they changed their procedure. Unfortunately, Mr. Moylan was caught in the middle. This was an unfortunate situation.

The government does not think he should go without any compensation, and it is on that basis that we grant he is entitled to quantum meruit recovery.

The Court: You are basing your quantum meruit upon 6½ cents a ton?

Mr. Lavine: Yes; the same basis on which the plaintiff was willing prior to that time to negotiate with the government. We cite that as being the best possible evidence now as to the basis on which plaintiff was freely willing to negotiate with the government.

The Court: I know, but he testified he gave them a low price because he wanted to get on the list, he wanted to make this connection.

Mr. Lavine: Yes, your Honor; that is very [30] true. Let's turn, for example, and take plaintiff's argument that he should be entitled from the government to 1¼ per cent. How would that be fair?

The government is under no necessity to employ plaintiff to make those shipments. Even in commercial transactions the shipper does not pay the large 1¼ per cent figure. That is paid by the shipping company. If there is any fault that attaches to GSA because of what has gone on, surely the plaintiff was equally at fault in going ahead and relying upon a possible change in procedure. In that sense the plaintiff has acted as a volunteer. He hoped something would happen and did not get a commitment for it.

The Court: The government is willing to admit that the plaintiff is entitled to something?

Mr. Lavine: Yes.

The Court: You say the reasonable amount he would be entitled to would be 6½ cents a ton?

Mr. Lavine: That is the best basis there is available in the testimony, your Honor.

The Court: All right.

Mr. Lavine: In fact, I don't believe there is any other testimony in the record that would give us any better basis than that. The only other figure is 1¼ per cent, which is what the carriers are glad to pay for the business thrown their way. It is not something the shippers do.

The Court: Isn't that a good indication of what a [31] reasonable compensation is?

Mr. Lavine: No. If you and I are going to Europe, we will go down to a ticket broker's office, or we could go to the steamship company ourselves. We would rather go to the ticket broker's office because it costs us nothing. He may collect a 10 per

cent fee from a steamship line which is anxious to get the business, but you and I are not willing to pay the 10 per cent for the ticket for the little services which the broker gives us.

If we had to pay the 10 per cent, we would rather go to the carrier itself and get the services. In other words, in that economic status, you or I or the government is in a position where we are not compelled to pay the 10 per cent figure that the carrier is perfectly willing to pay from its profits.

That is why the 1¼ per cent figure is not a fair one to apply to the government.

Looking at the whole economic situation, the steamship companies still have in their pocket the 1¼ per cent.

The Court: But they didn't pay it to the plaintiff because the government sat on its hands and wouldn't give this authorization. Is the plaintiff supposed to lose this money because the government did that?

Mr. Lavine: In equity we may say it is unfair, but nevertheless there has been no contractual relation which [32] obligates the government to do that.

The Court: The only issue here is this. You are willing to admit the plaintiff is entitled to reasonable compensation?

Mr. Lavine: Yes.

The Court: Then the only issue is what is reasonable compensation?

Mr. Lavine: Yes.

The Court: So I have got your theory that 6½ cents a ton is fair and I have got the plaintiff's

theory that it is 1¼ per cent of the ocean freight.

Mr. Lavine: And our theory is based on the fact that that is the only available evidence we know of.

The Court: I will call the plaintiff back to the stand a minute. In the light of this statement, I have got some other questions I want to ask the plaintiff.

JOHN J. MOYLAN

the plaintiff herein, having been heretofore duly sworn, resumed the stand and testified further as follows:

Examination

By the Court:

Q. The government has admitted you are entitled to reasonable compensation. Forgetting any contractual relationship of any kind at all, what was the reasonable compensation? [33]

A. I would base it on the 8,305 figure.

Q. How did you arrive at that?

A. The government itself placed that figure, your Honor. When a forwarder handles a shipment, there is brokerage paid on it. The government by their own admission says that you can't collect the forwarding fee because it is worth 1¼ per cent to handle it, which you are collecting from the steamship company.

Q. The government is not paying you 1¼ per cent.

A. No; but I am collecting 1¼ per cent from the steamship company.

Q. They are authorizing that? A. Yes.

Q. And they have authorized that since 1953?

(Testimony of John J. Moylan.)

A. 1954.

Q. August, 1954.

A. Yes.

Q. They authorized it?

A. Yes. Then they started issuing a brokerage power of attorney.

Q. A little while ago your counsel said he wanted to establish the reasonable value of these services. Your only theory of reasonable value is the 1¼ per cent.

A. Well, using, also, the government's reasonable value on it, too, sir, because, as I say, if we are going to collect [34] brokerage, we are going to collect $10 brokerage on the shipment. We cannot bill the government.

Mr. Gately: May I ask a question?

The Court: Certainly.

Redirect Examination

By Mr. Gately:

Q. In the Los Angeles area, what is the prevailing charge for similar services?

A. The government services now?

Q. Any services, the cost to industry, what is the cost to industry for forwarding services?

A. It is a service fee plus 1¼ per cent of the ocean freight.

The Court: That is what you get from everybody except the government?

The Witness: Yes, sir; a service fee plus 1¼ per cent.

(Testimony of John J. Moylan.)

Q. (By Mr. Gately): You get it from the government now just because the government changed its procedure in words. The carrier refused to pay you 1¼ per cent because you were not designated by the government between 1951 and 1953 as their agent by filing a power of attorney?

A. I was designated on their shipping instructions, but they did not file the power of [35] attorney.

Q. They refused to file it and they reserved the booking of cargo to themselves? A. Yes, sir.

Q. In 1954 they changed that procedure by saying, "We will tentatively book the cargo and you confirm it in Los Angeles." The government is still booking cargo, but by a play of words you are collecting brokerage? A. Yes, sir.

Q. So, it was just a question of procedure on the part of the GSA? A. Yes, sir.

The Court: Since August, 1954, you have been collecting this brokerage of 1¼ per cent on government shipments?

The Witness: Yes, sir.

The Court: How many government shipments have you had?

The Witness: It is difficult to say, your Honor.

The Court: Few or many?

The Witness: We have the present contract right now. I call it a contract because we are supposed to handle it at 1¼ per cent. We have had 20 or 30 shipments. Last year we had maybe five or 10.

(Testimony of John J. Moylan.)

The Court: I have no other questions.

Mr. Gately: I would like to just make a short answer to—— [36]

The Court: I would like to ask Mr. Lavine a question.

Mr. Lavine: May I ask a question of the witness?

The Court: Yes; go ahead.

Recross-Examination

By Mr. Lavine:

Q. In clarification of your last answer to his Honor's last question, you say industry now pays 1¼ per cent forwarding fee. It is my understanding, and is it yours, that the commercial practice is the carrier pays the 1¼ per cent, and any private agency pays the forwarding fee which is negotiated by you and the shipper upon various factors, and the principal one to you is the quantum of service you perform; is that correct?

A. Yes, sir. The shipper pays a fee, and the steamship company pays 1¼ per cent.

Q. At the present time you receive no forwarding fee from the government, but a fee of 1¼ per cent from the carrier like the steamship line; is that correct? A. Yes.

Mr. Lavine: That's all.

Mr. Gately: That's all.

The Court: You may step down.

(Witness excused.) [37]

The Court: Now, Mr. Lavine, I want to ask you a question. You say the reasonable compensation ought to be 6½ cents a ton. If the government now is authorizing the filing of a power of attorney by which the plaintiff can get 1¼ per cent of the ocean freight, why would they do that if 1¼ per cent wasn't reasonable compensation?

Mr. Lavine: The 1¼ per cent is very reasonable, but not from the shipper. Not even in commercial practice does the shipper pay the high rate of 1¼ per cent. That is what the carrier is willing to pay from its profits.

The Court: The carrier was willing to pay this if the government would file its power of attorney.

Mr. Lavine: Yes; but it wasn't done, your Honor. That still brings us back to the question of how can we determine the value from the government. We maintain 1¼ per cent is not fair from the government or any shipper, be it private or public. It is not the going rate. We can't use that figure.

The Court: I wonder if I couldn't suggest something here. The government is willing to consent that the reasonable value would be $1,881.10. The plaintiff contends 8305 is a reasonable compensation. If I haven't made a mistake, the difference between the government figures and the plaintiff's figures is $6,423.90. If I would hold in favor of the plaintiff here, the government would have to pay $6,423.90, [38] provided they didn't appeal and reverse me.

If I would hold for the government, on the con-

trary, it means the plaintiff wouldn't receive anything at all. I think that the government figure of 1881 is too small. I may have the opinion that the plaintiff's figure of 8305 is too high. Why not settle this by cutting the difference in two? Half of 6423 would be 3211. That is about as equitable a solution as I can figure out.

Otherwise, I am going one way or the other, and I am not going to hold the plaintiff is entitled to recover the entire amount or not recover anything.

Could you agree to that without consulting Washington?

Mr. Lavine: In this case we are desirous of settling anything that is possible. I would prefer if your Honor would rule—not against us, but if your Honor feels moved to rule against us in the full amount, I would rather do that than assure you that we can get a compromise. This is the kind of case in which the General Accounting Office is involved and I have no assurance the General Accounting Office will agree to a compromise figure. They could have done it in the first place, but they did not wish to do so.

The Department of Justice reserves full authority to settle any case once in litigation, but as a practical matter it is not done, especially in matters like this. [39]

The Court: Of course, there is one thing here, that sometimes the broker or the shipper selects the steamship, but in this case the government selected the steamship. That is one service the plaintiff didn't perform. It may be very minor, but if it is

worth $10, it should be taken off the entire amount, so there is one place where some adjustment would have to be made. I don't know how much the service really is worth.

Mr. Lavine: If I could have settled the case, your Honor, I would have endeavored to do so prior to engaging your Honor's time. I don't hold out much hope of a successful settlement.

The Court: I better go ahead and settle this case because if you write back to Washington, they may sit back for another two or three years. I think I better settle this case and get it over with.

Mr. Lavine: We prefer that, your Honor.

Mr. Gately: Your Honor, may I make a short statement in regard to Mr. Salisbury? The Act requires the government agency to use a freight forwarding service. Mr. Salisbury is in charge of the Transportation Division. As such he had authority to request these services.

The Court: I will read the exhibits. I will go over all the exhibits.

Mr. Gately: Just one more point, your Honor. The [49] prevailing rule of law is, first, as you will see in my trial memorandum, if there was an agreed price for performing these services, that is the fairest basis of the value. In the absence of such a price, then you take the cost in the community. Mr. Lavine says it costs the shipper nothing. It costs nothing because it is included in the total freight charge. The carrier puts that in his freight charges for he knows he is going to pay 1¼ per cent.

The Court: But we have got this 6½ cents.

ton. At that time he says it was a reasonable figure. He may have had certain desires for establishing that, but at that time he was satisfied.

Mr. Gately: For the reasons stated, he wanted to get on the approved list. After all, the government is a good customer and it is just like a young lawyer starting out. You are not going to charge a sky high fee to get a case when what you want is to get a name.

The Court: I will take the matter under submission and I will go over the exhibits and let you know what my decision is.

Mr. Gately: All right. Thank you, your [41] Honor.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 4th day of December, 1956.

s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed December 6, 1956. [42]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 24, inclusive, containing the original

Complaint;
Answer to Complaint;
Findings of Fact, Conclusions of Law, and Judgment;
Notice of Appeal;
Designation of Record on Appeal;
Counter-designation of Record on Appeal;

and a full, true and correct copy of

Notification of Entry of Judgment;

B. 1 volume of Reporter's Official Transcript of Proceedings had on October 8, 1956;

C. Plaintiff's exhibits 1, 2, 3, 4, 5, 6, 9, 10, 11, 13, 24 and Defendant's exhibits b, c, f, g.

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Witness my hand and the seal of said District Court, this 7th day of January, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15411. United States Court of Appeals for the Ninth Circuit. John J. Moylan, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: January 8, 1957.

Docketed: January 16, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 6 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.
No. 646

JOHN J. MOYLAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

THOMAS J. GATELY,
112 West Seventh Street,
San Pedro, California,
Attorney for Petitioner.

SUBJECT INDEX

PAGE

Opinions below 1

Jurisdiction 2

Questions presented for review 2

Statutes involved 2

Statement of the case 3

Argument 7

I.

The decision below is in conflict with a decision of this court and a decision of the United States Court of Claims on the question of reasonable value 7

II.

The decision below is in conflict with established legal precedents in re the formation of a unilateral contract 9

III.

The decision below is in conflict with a decision of the Third Circuit and various federal district courts 10

Conclusion 11

Appendices:

Appendix "A." Judgment of the United States Court of Appeals for the Ninth Circuit ..... App. p. 1

Appendix "B." Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. p. 2

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Blandy v. United States, 33 Fed. Supp. 752	10
Clark v. United States, 95 S. Ct. 539, 24 L. Ed. 518	7
Federal Crop Insurance v. Merrill, 332 U. S. 380	9
Gray v. Cheatham, 52 S. W. 2d 762	8
Pacific Maritime Ass'n v. United States, 123 Ct. Cl. 667, 108 Fed. Supp. 603	7
Smale and Robinson, Inc. v. United States, 123 Fed. Supp. 457	11
Southern Pacific Co. v. United States, 192 F. 2d 438	10

STATUTES

United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 41, Sec. 252	3, 10
United States Code, Title 46, Sec. 1127	2, 10

REGULATIONS

United States Maritime Board, General Order 70, Amdt. 2, Sec. 243.2	10

OTHER AUTHORITIES

2 American Jurisprudence, Sec. 311, p. 244	8
12 American Jurisprudence, Sec. 43, p. 537	9
58 American Jurisprudence, Sec. 10, p. 518	8
27 California Jurisprudence, Sec. 44, p. 238	8

IN THE

Supreme Court of the United States

October Term, 1957.

No. .....

JOHN J. MOYLAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Your petitioner, John J. Moylan, plaintiff below, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed a judgment rendered by the United States District Court for the Southern District of California, Central Division.

Opinions Below.

The Findings of Fact, Conclusions of Law [R. 11-14] and Judgment of the District Court [R. 14-15] are not officially reported. The opinion of the United States Court of Appeals for the Ninth Circuit [R. 57-60; Appx. A] has not yet appeared in the official reports. A timely petition for rehearing was denied by that Court [R. 62] on September 11, 1957.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1). The judgment of the United States Court of Appeals for the Ninth Circuit was dated and entered on August 8, 1957 [R. 61; Appx. A]. The order denying the petition for rehearing is dated and was entered on September 11, 1957.

Questions Presented for Review.

First Question.

Whether or not the reasonable value for requested services rendered should be based on the agreed rate of compensation, or, in the absence of such an agreement, reasonable value should be determined by the cost to industry for like services in the same locality.

Second Question.

Whether or not a request to perform an act followed by performance of the requested act, forms a valid unilateral contract.

Third Question.

Whether or not the acts of a government agent when acting within the scope of his authority, works an estoppel against the government.

Statutes Involved.

46 U. S. C., Section 1127:

> (a) The Commission is hereby authorized and directed, through such administrative measures, agreements with other Federal departments and agencies, contracts with individuals or private business

concerns, or other arrangements, as it may deem to be necessary or appropriate in the public interest, to coordinate the functions and facilities of public and private agencies engaged in the forwarding and similar servicing of waterborne export and import foreign commerce of the United States, for the efficient prosecution of the war, the maintenance and development of present and post-war foreign trade, and the preservation of forwarding facilities and services for the post-war restoration of foreign commerce. * * *

41 U. S. C. Section 252:

(a) The provisions of this chapter shall be applicable to purchases and contracts for property and services made—

(1) By the General Service Administration for the use of such agency or otherwise. * * *

(c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts maybe negotiated by the agency head without advertising if—

(3) the aggregate amount involved does not exceed $1,000. * * *

(4) for personal or professional services.

Statement of the Case.

Appellant is a duly licensed freight forwarder engaged in business in the City of Los Angeles, State of California.

The Pacific Westbound Conference is an association of ocean carriers operating between the West Coast and the Orient.

General Services Administration is an administrative branch of the United States Government.

Prior to June, 1951, member carriers of the said Conference did not pay a brokerage fee to freight forwarders. Consequently government agencies entered into contracts with licensed freight forwarders for the handling of government shipments. In June, 1950, appellant submitted a low bid of 6½ cents per ton or a minimum charge of $7.50 per shipment and was awarded a contract with General Services Administration. The main reason for appellant's low bid was to get his name on the list of approved forwarders and demonstrate the quality of his work to the government [R. 23]. This contract expired by its own terms on June 30, 1951.

In June, 1951, this Conference Rule was changed and commencing July 1, 1951, freight forwarders were paid a brokerage fee of 1¼% of the ocean freight charge on all shipments transported by member carriers. On July 3, 1951, appellant wrote to General Services Administration offering to perform forwarding services at no charge to the government in view of the fact that he would receive the said brokerage payment from the carrier. On July 9, 1951, General Services Administration replied to appellant's letter and stated in substance that in view of the payment of said brokerage by the carrier to forwarders designated by the shipper no contract with the government was necessary, but the government would rotate their shipments among licensed forwarders.

With this common understanding of the parties hereto as to the payment of brokerage by the carrier designated by the shipper, the appellee on or about July 15, 1951, re-

quested appellant to act as its agent in performing forwarding services on appellee's shipments and continuously thereafter requested and used appellant's services as a forwarding agent until August, 1953. Appellant performed all services requested by appellee during this period and repeatedly demanded that appellee file with the said Conference a designation of the appellant as agent of the appellee. In lieu of filing the said designation appellee supplied appellant with various reasons as to why the designation could not be filed at that time, but promised that the matter would be straightened out. The main excuse of appellee for not filing said designation was the rule of said conference that appellant be designated as an agent who actually booked the cargo. Appellee insisted that it was the policy of the appellee to book its shipments and the appellee refused to either allow the appellant to book the cargo or credit the appellant with the booking. Due to this refusal of the appellee to file said designation the appellant was unable to collect earned brokerage fees in the amount of $8,543.72 from the member carriers.

Appellant submitted a claim to the appellee in the sum of $238.48 for postage expenses incurred in performing the said requested forwarding services on appellee's shipments. This claim was approved by the appellee and appellant was reimbursed in full for said expenses. Appellant also submitted a claim for compensation lost in the amount of $8,305.24 due to appellee's refusal to designate him as its agent. Appellee conceded that appellant had rendered valuable services to appellee and agreed to pay

appellant on a *quantum meruit* basis. As a basis for determining the reasonable value of appellant's services the appellee referred to the rates paid appellant under the prior expired contract and offered appellant the sum of $1,881.10 in full settlement of his claim. Appellant refused this offer on the ground that reasonable compensation should be based first on the agreed rate of compensation, to wit, 1¼% of the ocean freight charge, or in the absence of such an agreement reference should be made to the cost to industry for similar services in the Los Angeles area. Appellee refused to offer more than the original sum of $1,881.10. In August, 1954, appellee changed its procedure by tentatively booking the cargo in Washington and allowing the freight forwarder to confirm the booking. Under this new policy appellee filed a designation of appellant as its agent with the said Conference in September, 1954, and from that date on appellant has been paid brokerage by the member carriers on all shipments he forwarded for the appellee.

The District Court held in favor of defendant. Plaintiff appealed to the Court of Appeals which court affirmed the decision of the District Court and denied appellant's petition for a rehearing.

ARGUMENT.

I.

The Decision Below Is in Conflict With a Decision of This Court and a Decision of the United States Court of Claims on the Question of Reasonable Value.

In deciding the question of reasonable value for services rendered in the case of *Clark v. United States*, 95 S. Ct. 539, 24 L. Ed. 518, this court stated:

> "Value for the use of vessel per day, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract."

In *Pacific Maritime Association v. United States*, 123 Ct. Cl. 667, 108 F. Supp. 603, Judge Whitaker answering the question: "What is fair compensation?" stated:

> "No better answer to the question of what is fair compensation, than what the parties agreed upon, to wit, 1.7 cents per hour."

The court below in its opinion [R. 59; Appx. A] complained that the trial court should have been given some intelligent middle ground upon which to land. On this basis the court below affirmed the decision of the trial court in its selection of the lowest price available through the medium of competitive bidding in determining the reasonable value of services rendered. No middle ground was given by the plaintiff below due to the fact that there is no such basis available. Plaintiff below testified that the cost to industry for forwarding services in the Los Angeles area is 1¼% of the ocean freight charge, which testimony was not rebutted by the government [R. 40]

The court below also stated [R. 59; Appx. A]:

> "If there had been proof that there was during the period in question a uniform rate paid by shippers, not carriers, this court could explore whether the ruling below was clearly erroneous. But the reasonable value of services performed for a buyer is not always the same as when performed for a seller."

It is a matter of common knowledge that a carrier in establishing rates includes the cost of brokerage fees. The shipper pays a uniform rate whether or not he employs the services of a freight forwarder. The court below in affirming the decision of the trial court ignored the pronouncements of this court and the Court of Claims as set forth above.

The court below also ignored established legal precedents set forth in the case of *Gray v. Cheatham*, 52 S. W. 2d 762, 763, and the prevailing rule of law *in re* determination of reasonable value as set forth in 2 Am. Jur. 244, Sec. 311; 58 Am. Jur. 518, Sec. 10, and 27 Cal. Jur. 238, Sec. 44.

This court has never ruled on the correct basis for determining reasonable value in the absence of any evidence on the subject. It is vital to industry that this Court clearly enunciate the correct basis for such a determination. In the absence of such a ruling the basis in the 9th Circuit for determining reasonable value will be the lowest price available for similar services in the same locality.

II.

The Decision Below Is in Conflict With Established Legal Precedents in re the Formation of a Unilateral Contract.

American Jurisprudence sets forth a clear definition of the rule of formation of a contract by performance of an act:

> "In reference to the sufficiency of an acceptance, there is a distinction between an offer to make a contract executory on both sides and an offer of promise for an act. In the latter case the only acceptance of the offer that is necessary is the performance of the act. In other words, the promise becomes binding when the act is performed."
>
> 12 Am. Jur. 537, Sec. 43.

In its decision, the court below repudiated this established legal principle and justified its ruling by a vague reference to the inapposite case of *Federal Crop Insurance v. Merrill*, 332 U. S. 380. Exhibits 2 and 3 show a common understanding that the plaintiff below was to receive a definite rate of compensation for his services. Finding of Facts No. 4 [R. 12] shows the performance by the plaintiff of all requested acts, but the court below omitted to consider the question of performance of a requested act or ratification of these acts by the acceptance of benefits resulting therefrom.

III.

The Decision Below Is in Conflict With a Decision of the Third Circuit and Various Federal District Courts.

At the trial of this action the government raised the defense of lack of authority by the Director, Storage and Transportation Division of General Services Administration to bind the government by contract. The authority of General Services Administration to use the services of Private Freight Forwarders is found in 46 U. S. C., Sec. 1127 (56 Stat. 176), and United States Maritime Board, General Order 70 Amendment 2, Section 243.2 Regulations. 41 U. S. C., Section 252, authorizes the head of General Services Administration to negotiate contracts without advertising providing the aggregate amount does not exceed $1,000, or the contract is for personal or professional services. Although said Director has an affidavit in the record that he is not a contracting officer of the United States, there is a presumption in law that such Director performed his official duties and the authority to employ an agent was delegated to him. This presumption was not rebutted by the government.

In the case of *Southern Pacific v. United States*, 192 F. 2d 438, the court stated:

> "Where an army transportation officer had charge of shipping obsolete equipment he had incidental authority to contract for its transportation."

In the case of *Blandy v. United States*, 33 Fed. Supp. 752, the court held:

> "There is a presumption that an officer of a government agency was delegated for the duty he performed."

In its opinion the court below omitted to consider or discuss this presumption and the fact that the government had failed to overcome said presumption.

The court below also omitted to consider the question of estoppel where an agent of the government acts within the scope of his authority.

In the case of *Smale and Robinson, Inc. v. United States* (1954), 123 Fed. Supp. 457, District Judge Mathes states:

> "Acts or omissions of agents lawfully authorized to bind the United States, or *direct its course of conduct* during a particular transaction will work estoppel against the government if agents acted with the scope of their authority."

The court below based its ruling on the affidavit of the Director that he was not a contracting officer of the United States and refused to consider the questions of incidental authority, the presumption of delegation of authority or the question of estoppel as set forth in the above cited decisions.

Conclusion.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS J. GATELY,

Attorney for Petitioner.

APPENDIX "A."

United States Court of Appeals for the Ninth Circuit.

John J. Moylan, Appellant vs. United States of America, Appellee. No. 15411.

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment Filed and Entered: August 8, 1957. Paul P. O'Brien, Clerk.

APPENDIX "B."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

John J. Moylan, Appellant vs. United States of America, Appellee. No. 15,411. Aug. 8, 1957.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before Chambers and Barnes, Circuit Judges; Walsh, District Judge.

CHAMBERS, Circuit Judge:

Moylan is a freight forwarder at Los Angeles. For a year prior to June 30, 1951, under a specific contract with the General Services Administration, the housekeeping organization of the United States government, he guided through the Port of Los Angeles and on to vessels outbound into the Pacific a considerable volume of government freight. It is fair to say that his contract price of six and one-half cents per ton plus a fee of $7.50 for each shipment was a modest one. Moylan says the reason he bid for and obtained the contract at these rates was that when he did he was a beginner and anxious to get started in the business.

In June, 1951, the West Coast carriers affiliated together under the name of Pacific Westbound Conference initiated the practice of paying freight forwarders such as Moylan a brokerage fee of one and one-fourth per cent of the shipping charges.[1] Obviously, General Services im-

---

[1] A prerequisite to the commission or fee was the filing by the shipper of a formal designation of the forwarder as the shipper's forwarder.

mediately was desirous of eliminating its brokerage fees to Moylan, but there were obstacles. The new rules of the Pacific Conference required that the selection of the carrier for each shipment be made by the freight forwarder. General Services took the position that it had to retain the right to select the carriers, that is, the booking.

In August, 1954, some manner of "initial booking" by General Services in Washington and "confirmation booking" by the freight forwarder was arranged that was acceptable to the Pacific conference. Thereupon, Moylan was formally designated by certificate filed with the conference by General Services as a freight forwarder for the government. And since 1954 Moylan has been receiving the pay for his services to General Services from the carriers—two steps removed from the taxpayers, rather than one.

But what of the interim? For two years and two months after June 30, 1951, with no express bilateral written contract with the government and without the certification required by the Pacific carriers Moylan acted as freight forwarder for General Services. During this time he pressed to have his status clarified. The pattern of the Pacific conference just did not mesh with the government's plan of doing business, and it took three years to remodel the Pacific conference's and the government's contract machinery.

For the two years, two months of uncompensated service if paid for at the rate listed under Moylan's expired contract, he would be entitled to $1,881.10. But if Moylan could have been paid the one and one-fourth per cent by the carriers his compensation would have been $8,305.24. Eventually, Moylan filed his claim with the government for this $8,305.24. The General Accounting

Office allowed only $1,881.10 and tendered a treasury check for that amount which Moylan received but has not yet cashed, being unhappy with the settlement. Following receipt of this, to him, inadequate check, Moylan sued in the United States District Court at Los Angeles for the sum of $8,305, being 24 cents less than the amount he could have been paid by the carriers had he been certified all along. It may be assumed that *sub silentio* Moylan proposed to return the check for $1,881.10.

The government's position in the accounting office and at the trial was that Moylan did perform services at the request of the government for which he should be paid the reasonable value, but no more than at the expired contract rate, to wit: $1,881.10, the sum already tendered. This position the trial court sustained. The judgment contemplates that Maylan may cash the check which he already has, but no more.

In his complaint and at th trial, in addition to his *quantum meruit* claim, Moylan sought to establish an express contract. One theory was that of unilateral contract: The government by accepting Moylan's performance had made a contract. The trial court found there was no contract during the period in suit. After examining the record, including the exhibits, this court agrees.

At no time after June 30, 1951, did Moylan agree that the old contract rate was acceptable. He was steadily pressing for the certification to the Pacific conference so that he could collect his one and one-fourth per cent, not from the government but from the carriers. It could not be said that by any means he consented to a continuance of his old cut-rate arrangement. But he kept on performing the forwarding service on the outbound Pacific freight of General Services. If one could find an express contract

here, there still is the insuperable block that there is no showing of a contracting act by an authorized contracting officer. There is ust too much herein of Federal Crop Insurance v. Merrill, 332 U. S. 380, to permit a recovery on express contract or upon some sort of an estoppel.

Appellant also complains of the *quantum meruit* finding that $1,881.10, already tendered, was the reasonable value of the services. Certainly the award cannot be called generous. However, Moylan's last contract rate was admissible as evidence of the reasonable value of his services. It may be assumed that the percentage rate paid by the carriers after they commenced to absorb the compensation for forwarders was also competent evidence to receive. There is every indication in the record that if the trial court had been given some intelligent middle ground upon which to land, that such would have been done. But the court was given no such opportunity. If there had been proof that there was during the period in question a uniform rate paid by shippers, not carriers, this court could explore whether the ruling below was clearly erroneous. But the reasonable value of services performed for a buyer is not always the same as when performed for a seller. Generally, when the seller pays there is an element of "you got us the business" to be paid for. That would be true here where the forwarders on private shipments probably were free to select the carrier. Apparently, only on the government shipments was there a formal restriction on selection of a carrier.

Here there was a justifiable reason for the trial court to reject the higher figure. Then under the evidence the court had little choice except to take the low figure. Not too much may be required for a trier of facts to come up with an intermediate figure, but it should have some foundation.

General Services Administration seems to have been unduly ponderous in handling its business with Moylan. But on its side it can be said that the new mode of the Pacific carrier's conference adopted in 1951, whereunder the carriers undertook to pay the forwarder, was not tailor-made for government shipments. Adjustments had to be made before it was usable. To have immediately accepted and certified Moylan, giving Moylan control over bookings, if such could have been done, might have provoked on honorable men criticism of favoritism.

The judgment is affirmed.[2]

(Endorsed:) Opinion. Filed Aug. 8, 1957.

Paul P. O'Brien, Clerk.

[2] Appellee suggests here that perhaps this is a case in which the government has not consented to be sued. Then it is cavalierly said that since the judgment gave Moylan nothing he did not have already, and the judgment (it says) is correct if the government has consented to be sued; therefore, it will not press this possible defect. If such defect exists it should be disclosed—even now.

No. 646

In the Supreme Court of the United States

OCTOBER TERM, 1957

JOHN J. MOYLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
HERSHEL SHANKS,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	9

CITATIONS

Cases:

Comstock v. *Group of Investors*, 335 U. S. 211 ... 8

Corn Products Refining Co. v. *Commissioner of Internal Revenue*, 350 U. S. 46 ... 8

Federal Crop Insurance Corp. v. *Merrill*, 332 U. S. 380 ... 7

Goodyear Tire & Rubber Co. v. *United States*, 276 U. S. 287 ... 9

Merritt v. *United States*, 267 U. S. 338 ... 9

Sutton v. *United States*, 256 U. S. 575 ... 9

United States v. *Minnesota Mutual Investment Co.*, 271 U. S. 212 ... 9

Whiteside v. *United States*, 93 U. S. 247 ... 7

Statute:

Tucker Act, 28 U. S. C. 1346 (a) ... 2

450821—57

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 646

JOHN J. MOYLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court's Findings of Fact and Conclusions of Law (R. 11–14) are not reported. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 2–6) is reported at 247 F. 2d 623.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1957 (Pet. App. 6). Petitioner's timely motion for rehearing was denied on September 11, 1957 (R. 62). The petition for certiorari was filed on December 6, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the courts below erred in making the following three findings of fact, any one of which would bar petitioner's claim:

(a) That there was no contract in fact—unilateral or otherwise—between petitioner and the Government for the forwarding of freight during the period in question;

(b) That in any event the Government officers involved had no authority to contract on behalf of the Government;

(c) That the reasonable value of petitioner's services to the Government was the amount of the check sent to and retained by petitioner.

2. Whether the Tucker Act, 28 U. S. C. 1346 (a), confers jurisdiction on the district courts to render a judgment against the Government on the basis of a contract implied in law.

STATUTE INVOLVED

28 U. S. C. 1346 (a) provides in pertinent part as follows:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

STATEMENT

Petitioner filed his complaint in the District Court for the Southern District of California invoking the jurisdiction of that court under the Tucker Act, 28 U. S. C. 1346 (a) (R. 3). The complaint recited three counts: the first count alleged breach of a written contract (R. 4); the second, breach of an oral contract (R. 5); the third, breach of a contract implied in law, for which recovery was sought on a *quantum meruit* basis for services rendered (R. 6).

The facts as developed at trial may be summarized as follows:

Petitioner is a freight forwarder at Los Angeles who, prior to the events giving rise to the instant litigation, held a one-year written contract with the General Services Administration (G. S. A.) to serve as its forwarding agent for Government freight bound into the Pacific (Pet. App. 2). The contract fee for this service was six and one-half cents per ton with a minimum of $7.50 per shipment (R. 22, 28). This contract expired by its own terms on June 30, 1951 (Pet. App. 2; R. 40). During this period, freight forwarders received their entire commission from the shipper (R. 22).

At the time this contract expired, in June 1951, the Pacific Westbound Conference, an association of West Coast carriers, initiated the practice of allowing their carriers themselves to pay brokerage fees to freight forwarders such as petitioner (Pet. App. 2). Upon the shipper's filing with the Conference a formal designation of the particular forwarder as the shipper's forwarder, the forwarder was paid by the carrier a

brokerage fee of one and one-fourth per cent of the shipping charges (Pet. App. 2; R. 23, 25).

With the institution of this new arrangement, G. S. A. desired to eliminate its direct brokerage fees to the forwarder, since forwarders were now receiving commissions from the carriers; but the Government was not prepared to meet all the requirements of the Conference which had to be satisfied before the forwarder could collect his brokerage from the carrier. Under the rules of the Conference, the selection of the carrier was to be made by the forwarder (Pet. App. 3). G. S. A., however, took the position that it must retain the right to select its carriers (Pet. App. 3), and therefore refused to designate petitioner as its shipping agent. As a result, petitioner could not collect its brokerage from the carriers on Government freight.

However, petitioner continued to perform certain forwarding services with the knowledge and consent of Government officials (R. 12). The Government continued to make its own bookings, but petitioner handled the other details of forwarding, including confirmation of the booking and preparation of the bills of lading and other documents (R. 29, 20). It is admitted that no new formal contract was entered into between petitioner and G. S. A. (Pet. 4), although there was considerable correspondence between the parties.[1]

Finally, in August 1954, G. S. A. worked out an agreement with the Conference whereby the Govern-

[1] This correspondence, exhibits in the courts below, has not been certified by petitioner as part of the record in this court.

ment would make the initial booking in Washington, tentatively reserving the space, while the forwarder would make the confirmation booking in Los Angeles when it received shipping instructions (Pet. App. 3; R. 29). Once these arrangements were completed, petitioner was formally certified with the Conference by G. S. A. as its freight forwarder (Pet. App. 3) and, since August 1954, petitioner has been receiving its compensation wholly from the carriers at the rate of one and one-fourth percent of the shipping charges (Pet. App. 3). The Government has accordingly paid no brokerage fee directly.

The instant litigation arises over petitioner's compensation for his services during the period from June 30, 1951, when his contract expired, until August 1954, when arrangements were made between G. S. A. and the Pacific Westbound Conference under which G. S. A. certified petitioner as its freight forwarder.

The General Accounting Office sent to petitioner a check for $1,881.10, which it determined to be the reasonable value of his services. The basis for this determination was the Government's contract with petitioner which expired on June 30, 1951, and called for a brokerage fee of six and one-half cents a ton with a minimum of $7.50 per shipment (Pet. App. 3; R. 22, 28). Petitioner retained the check without cashing it, claiming that the reasonable value of his services should be determined by reference to the one and one-fourth percent of the shipping charges he would have received from the carriers had G. S. A. certified him as its shipping agent earlier (Pet. App. 3-4). On this basis, petitioner would be entitled to

$8,305.00 (Pet. App. 3–4). Upon the General Accounting Office's denial of his claim for this amount, petitioner instituted this suit.

The District Court, after examining the exhibits and the testimony, concluded as a matter of fact that no contract covering the period in question had been entered into between petitioner and the Government (R. 12), and that the reasonable value of petitioner's services to the Government was $1,881.10 (R. 13), the amount of the Government check which petitioner had in his possession. Accordingly, judgment was entered for the Government (R. 14).

On appeal, the Court of Appeals for the Ninth Circuit unanimously affirmed the District Court's finding of reasonable value, as well as the finding of no contract (Pet. App. 4–5). It specifically rejected petitioner's theory, urged in his present petition, that a unilateral contract had been consummated (Pet. App. 4). In addition, the Court of Appeals held that, even if a contract could be found, there was no showing that the contractual act was undertaken by an officer authorized to contract on behalf of the United States (Pet. App. 5).[2]

ARGUMENT

In his petition, petitioner contends: (a) that the evidence established a unilateral contract presumably consisting of a Governmental offer accepted by petitioner's act (Pet. 9); (b) that the Government officials who made this unilateral offer had authority to do so (Pet. 10–11); and (c) that the reasonable value of the

[2] The Government's exhibits, in the court's view, established that the officers involved had no such authority.

services rendered was $8,305.00, rather than $1,881.10 (Pet. 7–8). It appears that petitioner bases his third contention on alternative theories: first, that the alleged unilateral contract did not contain a price term and that therefore the contemplated contract price was the reasonable value of his services; second, that he may recover (irrespective of the existence or nonexistence of the alleged unilateral contract) the reasonable value of his services on the basis of a contract implied in law.

1. In order to prevail on the theory that the Government is liable for $8,305.00 for breach of a unilateral contract, petitioner must overturn three findings of fact, two of which were decided adversely to him by both courts below, and the third of which was decided adversely to him by the Court of Appeals.

Both the District Court (R. 12) and the Court of Appeals (Pet. App. 4) concluded that the evidence did not establish any actual contract—written or oral, bilateral or unilateral. In addition, both the District Court (R. 13) and the Court of Appeals (Pet. App. 5–6) found that the reasonable value of petitioner's services were $1,881.10. Finally, petitioner must also overturn the Court of Appeals finding that, even if the papers evidenced an actual contract, the commitment on the Government's behalf was not made by an authorized officer. See *Whiteside* v. *United States*, 93 U. S. 247; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380.

Thus, on this theory of the case, petitioner presents to the Court only three factual issues which have no application other than to the instant litigation. No

question of general importance is presented by the petition. As to the findings of fact on which both courts below passed, the familiar two-court rule making such findings well-nigh conclusive in this Court is clearly applicable. *Comstock* v. *Group of Investors*, 335 U. S. 211, 214; *Corn Products Refining Co.* v. *Commissioner of Internal Revenue*, 350 U. S. 46, 51. An affirmance on either of these findings would bar petitioner's claim. Further review in these circumstances is not merited.[3]

2. Although the suggestion is not made explicit, it appears that petitioner's argument as to the reasonable value of his services assumes, at least as an alternative theory, that the federal courts have jurisdiction under the Tucker Act to award a judgment against

---

[3] We do not deem it necessary to discuss the merits of petitioner's factual contentions that the evidence established (1) a unilateral contract (2) entered into by an authorized officer, in view of the fact that the evidence relating to these issues has not been made a part of the record in this Court.

As to petitioner's contention that the reasonable value of his services was $8305.00 rather than $1881.10, we entirely agree with the Court of Appeals' observation (Pet. App. 5) that the reasonable value of petitioner's services *to the Government* cannot be measured by what a third party (the carrier) would have paid to petitioner if, in addition to performing the forwarding services, the forwarder booked the shipment with the particular carrier paying the fee. The only other evidence of the value of these services was the earlier forwarding contract between the Government and petitioner for the same services. Moreover, the fee paid by the carrier, which petitioner contends should determine the reasonable value of his services, was in no way related to the shipping fee which the Government paid to the shipper. Finally, the Government did its own booking during this period, a service performed by the forwarder under the arrangement whereby the forwarder received his fee from the carrier.

the United States on the basis of a contract implied in law, *i. e.*, a judgment in quasi-contract for the reasonable value of services rendered. This of course is not the case.[4] It is well settled that "[t]he Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law". *Merritt* v. *United States*, 267 U. S. 338, 341. See also *Goodyear Tire & Rubber Co.* v. *United States*, 276 U. S. 287, 293; *United States* v. *Minnesota Mutual Investment Co.*, 271 U. S. 212, 217; *Sutton* v. *United States*, 256 U. S. 575, 581.

In any event, even assuming that there were the requisite jurisdiction, the courts below found as a fact (see *supra*, p. 8) that the reasonable value of petitioner's services was $1,881.10, the amount of the check retained by petitioner.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
HERSHEL SHANKS,
Attorneys.

JANUARY 1958.

[4] Although the Government alluded to this jurisdictional objection in its brief in the Court of Appeals, it was not pressed. See Pet. App. 6. However, it is of course appropriate to call the Court's attention to any defect in jurisdiction at any stage in the proceeding.